IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No.....

THE CITY OF NORTH CHICAGO, A MUNICIPAL CORPORATION, JOHN P. DROMEY, ANTON MACROWSKI, JR., WILLIAM ORLOWSKI, PETER CZAJKOWSKI, BENJAMIN NEWNHAM, LESLIE CALDER, JOSEPH McKILLEN, LOUIS ROSE, CASIMIR ZDANOWICZ AND WALTER KOZIOL,

Petitioners,

vs.

THE MACCABEES, A CORPORATION, THE MARYLAND CASUALTY COMPANY, A CORPORATION, AND GUST F. SANTRY,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Circuit Court of Appeals appears in the Record filed herewith at pages 301-306, and is reported in 125 Fed. (2d) page 330. Judge Kerner wrote the opinion; Judges Sparks and Minton concurred.

Jurisdictional Statement.

The jurisdictional statement appears in the petition, page 2 above.

Statement of the Case.

The statement of the case is set forth at page 3 and following above, and is therefore not repeated here, except that petitioners desire to emphasize the fact that this case is in the Federal courts solely on grounds of diversity of citizenship.

Summary of Argument.

The Circuit Court of Appeals should have denied equitable relief to plaintiff, because:

1. Granting such relief will inevitably produce a conflict with the State of Illinois, its courts and subordinate agencies, and it is unseemly and improper for Federal courts to attempt to coerce state agencies about a matter of purely state concern.

2. The non-existance of a right to equitable relief was a qualification of plaintiff's substantive right, and the Federal court should have applied the law of Illinois. The accident of diversity of citizenship should not have been allowed to produce a result in the Federal court different from that which would have been obtained in the state courts.

3. Even if plaintiff's right was purely procedural and not substantive, as argued under the preceding division hereof, the case was not one of which the Federal courts had general equity jurisdiction, apart from Illinois statute; and as a consequence, the Federal equity court could not act in the matter. Bases of jurisdiction assigned by the Circuit Court of Appeals were erroneous and unfounded.

ARGUMENT.

I.

The Withholding by the District Court of Any Relief Upon Plaintiff's Complaint Was a Proper Exercise of Discretion, Which the Circuit Court of Appeals Should Have Sustained.

It is not material in the argument of this point whether or not the District Court, in equity, had jurisdiction of the subject matter of the plaintiff's bill of complaint. Assuming jurisdiction existed, the District Court was right in declining to exercise it. The action of the District Court in the matter was in conformity with the cautionary observation of this Court in *Pennsylvania* v. *Williams,* 294 U. S. 176, 185, that courts of equity should exercise their discretionary power with proper regard to the rightful independence of the state governments in carrying out their own domestic policies. See also *Penn General Casualty Co.* v. *Pennsylvania,* 294 U. S. 189, 197; *Railroad Commission* v. *Pullman Company,* 312 U. S. 496; *Kelleam* v. *Maryland Casualty Company,* 312 U. S. 377, 382. The District Court was apparently unwilling to embark upon a course of litigation which would have led to "unseemly and disastrous conflicts in the administration of our dual judicial system." (*Penn General Casualty Co.* v. *Pennsylvania,* 294 U. S. 189, 195.) The action of the Circuit Court of Appeals in reversing this proper and suitable holding by the District Judge was error requiring review by this Court.

It was apparent to the District Judge that the granting of a mandatory injunction against petitioners and the other defendants would not end the case; the plaintiff also asked that the District Court retain jurisdiction of the

cause until the State law had been complied with (R. 29, Prayer No. 4). The District Judge indicated apprehension that, even if a mandatory injunction was granted after full hearing, the District Court would have to supervise all the further steps in the special assessment proceeding (see R. 246). It would be entirely possible for the plaintiff, after obtaining a mandatory injunction, to make repeated calls on the District Court, on every occasion when the County Court did not act in strict conformity with plaintiff's views of its rights. Thus, the case as made by the complaint was replete with possibilities of open hostility between the District Judge and the Judge of the County Court. Cf. *Toucey* v. *N. Y. Life Ins. Co.*, 314 U. S. 118, 135. This is precisely the sort of thing which this Court in the cases above cited has deplored, and has urged the District Courts to avoid. The reversal of the District Court by the Circuit Court of Appeals operates in defiance of those authorities, and is especially unfortunate in view of this same Court's decision in *Tolman* v. *Clark County*, 62 Fed. (2d) 226, cert. den. 289 U. S. 724.

When the bill of complaint was filed in the District Court, when the District Court dismissed the complaint, and even at the present day, there is pending in the County Court of Lake County the very special assessment proceeding in which plaintiff's rights must ultimately be determined, and to which the proceedings in the District Court were directed. Moreover, there was pending in that case (R. 17), a petition by this same plaintiff for a rule on some of the defendants to file the certificate of cost and completion, which is the objective of the mandatory injunction herein sought.* The situation was similar in all essential respects to that presented by *Kelleam* v. *Maryland Casualty Company*, 312 U. S. 377, wherein this Court held

* Plaintiff failed to appeal from the action of the County Court which it now challenges, and failed to seek a mandamus in the state courts.

that the Federal District Court should not have asserted its authority. It is submitted that the District Court was right in declining to act in the matter, and that the Circuit Court of Appeals was wrong in failing to uphold the District Court.

The scrupulous regard for the rightful independence of the state governments, which is one of the basic principles of Federal jurisprudence, should have operated to dissuade the Circuit Court of Appeals from directing that coercive action be taken against these petitioners, a municipal corporation and its present officials, in a case in which the state court remedies were adequate to protect the plaintiff's rights. In *Pennsylvania* v. *Williams,* 294 U. S. 176, at page 185, this Court pointed out how strong were the reasons for withholding equitable relief in the Federal courts where the exercise of jurisdiction would involve an unnecessary interference by injunction with the lawful action of state officers. There is no doubt that if equivalent relief can be procured in the state courts, a Federal injunction should not be resorted to. See cases cited *supra;* also *Keokuk Bridge Co.* v. *Salm,* 258 U. S. 122, 124. Likewise, this Court has held that the state court remedies should be pursued, at least in the first instance, where Federal court action would require interference by injunction with the fiscal operations of a state (*Matthews* v. *Rodgers,* 284 U. S. 521, 525). This Court has said that caution and reluctance should characterize the acts of Federal courts in interfering by injunction with the lawful operations of state officers (*Hawks* v. *Hamill,* 288 U. S. 52, 60, 61), especially where the rights are strictly local and jurisdiction has no basis except the accident of residence; and the fact that there is an adequate legal remedy in the state courts should be a ground for non-action by the Federal court in a case in which the Federal court, in order to give relief, must exert coercion upon state officials. See *Arkansas Building & Loan Association* v. *Madden,*

175 U. S. 269, 273; Cf. *Fenner* v. *Boykin*, 271 U. S. 240, 242, 243; *Mass. Grange* v. *Benton*, 272 U. S. 525, 527; *Indiana Manufacturing Co.* v. *Koehne*, 188 U. S. 681, 684, 690, 691.

The proceedings under the Illinois Local Improvements Act are part of the revenue system of the State. The State of Illinois is directly concerned with the validity and effectiveness of the special assessment procedure. When the Circuit Court of Appeals orders the District Court to grant relief by way of compelling the municipal officials to take steps in a special assessment proceeding, that Court is interfering with the revenue power of the State of Illinois—one of the most important of the attributes of sovereignty.

Such interference on the part of the Federal court was entirely unnecessary; if plaintiff had a valid claim, the state law was adequate to give relief and thus protect the private right. The state courts could give all warranted relief in a mandamus proceeding (*Conway* v. *City of Chicago*, 237 Ill. 128, 135). The policy of Congress in such a case has been expressed by the 1937 amendment to Section 24 of the Judicial Code (Title 28, U. S. Code, Section 41(1), expressly abolishing the jurisdiction of the District courts over suits to enjoin, suspend or restrain the levy, collection or assessment of any state tax, where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such state. It is not here suggested that this statute is controlling; the statute was passed after the bill of complaint in the case at bar was filed, and the statute provided that it should not affect any suit commenced prior to its enactment. Nevertheless, the statute does indicate the Congressional policy of non-interference with the fiscal rules and practices of the states, which policy the Circuit Court of Appeals by its opinion herein has utterly disregarded.

II.

In View of the Nature of Illinois Local Improvement Bonds, the Remedy of Bondholders Is a Part of the Substantive Right, So That the Federal Court Was Bound to Conform to the Illinois Law in Denying Equitable Relief.

It is plain that if this suit had been instituted in an Illinois state court, such court could not have granted relief in equity. Local improvement bonds, under the law of Illinois, are instruments of an unusual character. They are not general obligations of the city nor of any of its subdivisions, but are promises to pay only out of a special and particular fund derived from the proceeds of the collection of the special assessment. Illinois Local Improvement Act, Sec. 90, quoted *infra*, appendix, page 28; *City of Chicago* v. *Brede*, 218 Ill. 528, 536; *Morrison* v. *Austin State Bank*, 213 Ill. 472, 487; Cf. *Moore* v. *City of Nampa*, 276 U. S. 536. The remedy of a bondholder desiring to have a special assessment levied and collected is, in the Illinois practice, by mandamus (*Conway* v. *City of Chicago*, 237 Ill. 128, 135). The wording of section 90 of the statute (Appendix, page 29, *infra*) that the bondholders shall have relief "by way of mandamus or injunction" was the same when the *Conway* case was decided as it is now.

In the practice of Illinois, mandamus and injunction are not correlative remedies, and rights to both remedies cannot co-exist in the same case (*Fletcher* v. *Tuttle*, 151 Ill. 41, 59), the remedy by mandamus being proper only in a law action, and the remedy by injunction being proper only in a case of equitable cognizance. In Illinois, the distinction between law and equity has not to this day been abolished (*Frank* v. *Salomon*, 376 Ill. 439, 444).

That a mandatory injunction would not have been granted by an Illinois court is a necessary conclusion from

the decisions of the Supreme Court of Illinois in *White* v. *City of Ottawa*, 318 Ill. 463, 473, and *Des Plaines Foundry Co.* v. *City of Des Plaines*, 335 Ill. 213, 216. In both of these cases, the Supreme Court of Illinois held that the Local Improvements Act, as amended, abolished, by implication, the jurisdiction of equity over matters of local improvements, and that the jurisdiction of the County court over matters of local improvements was exclusive. Petitioners do not here contend that plaintiff was without a remedy by mandamus in a proper state court, if the facts justified such relief; but petitioners do maintain that the mandatory injunction as a substitute or alternate for a writ of mandamus is not available under Illinois law, and that a mandatory injunction is prohibited in Illinois in any case in which relief by mandamus is available. It was so held by the Supreme Court of Illinois in *Lyle* v. *City of Chicago*, 357 Ill. 41, 45, where the Court said:

> "We consider the rule to be well established in Illinois, that if relief is available to a litigant through mandamus, he must pursue that remedy, and that in such case equity has no jurisdiction."

Thus, except in a case where the Court is asked to administer a trust fund, consisting of collected proceeds of a properly completed special assessment (*Rothschild* v. *Village of Calumet Park*, 350 Ill. 330), it is the settled law of Illinois that the Local Improvements Act has abolished equity jurisdiction over special assessments.

It is not open to question that the Federal courts must, in matters of substantive law, follow the state rules, even though the Federal court proceedings are in equity. *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202; *Wichita Royalty Co.* v. *City National Bank*, 306 U. S. 103. The rules of decision of the state courts are, in such cases, laws of the state which the Federal courts are obliged to follow. *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223, 236. When the plaintiff's rights are predicated on state law,

it is improper to have one rule of state law in the state courts and another rule of state law in the Federal courts, and the state decisions as to the construction and effect of state statutes are binding on the Federal courts. *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 178; see also *Moore* v. *Illinois Cent. R. R. Co.*, 312 U. S. 630, 634. Where, as here, the Federal jurisdiction rests entirely on diversity of citizenship, the reasons impelling adherence to the state court decisions are more pressing, even though the acts of Congress do not require such adherence. The accident of Federal jurisdiction should not be permitted to disturb the equal administration of justice in coordinate courts, sitting side by side. *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 496.*

The remedy given by the law of Illinois for the enforcement of the rights of a specal assessment bondholder is a part of that right. Indeed, it may be said that the remedy and the right are co-extensive; in other words, that the right consists of nothing but the remedy. A special assessment bondholder, under Illinois law, has no direct right to receive any sum of money from anyone,** and is not the promisee of any unqualified promise. His only right is to have the special assessment confirmed and collected, so that the proceeds thereof may be distributed to him along with all other holders of bonds of the same series. Plaintiff was charged with notice of, and bound by, the Illinois statute pursuant to which the bonds were issued (*Kersch Lake Drainage Dist.* v. *Johnson*, 309 U. S. 485, 491). It is impossible to state the bondholder's substantive right except in terms of a remedy. Therefore, although the right of the bondholder has a procedural aspect, it is not an adjective right, but is one which so far marks, limits and defines that which the bondholder has,

* See Frankfurter, Judicial Powers of Federal and State Courts, 13 Cornell L. Quar. 499, 526; Warren, Federal and State Court Interference, 43 Harvard L. Rev. 345, 347.

** See citations of authority at page 15, *supra*.

that it is itself part and parcel of the substantive right. Thus, the non-availability of the remedy by mandatory injunction in equity is a part of the plaintiff's substantive right, just as truly as was the rule of burden of proof in the case of *Cities Service Oil Co.* v. *Dunlap*, 308 U. S. 208. The only difference is that in the *Dunlap* case, the procedural rule of burden of proof operated as an assurance in favor of the title of the owner of land, whereas in our case the absence of the equitable remedy is a limitation upon the title of the bondholder.

The Circuit Court of Appeals in its opinion herein (R. 304) speaks of the propriety of protecting the "state created substantive right." But under the authorities herein cited, the right, by definition, included the remedy, and the Circuit Court of Appeals erred in disregarding the state inhibition against equitable relief.

III.

The Case Made by the Bill of Complaint Is Not One Which Lies Within the Jurisdiction of the Federal Court Sitting in Equity.

If the disability of the plaintiff to obtain a mandatory injunction in the Illinois courts to coerce compliance with the Illinois statute was a matter of substantive law, we have in the preceding division hereof shown that the lower court erred in not following the Illinois law. If, on the other hand, the Illinois state rule was merely procedural, the same conclusion follows.

The Illinois statutory provision that a bondholder may have relief by "mandamus or injunction" (*infra*, page 29), can have no effect upon the authority of the Federal court to give relief in the matter. If what the statute confers is merely a remedy, such statute cannot affect the procedure in the Federal court (*Pusey & Jones Co.* v.

Hanssen, 261 U. S. 491, 499). No remedial right to proceed in a Federal court can be enlarged by a state statute (*id.*, at page 497). The Circuit Court of Appeals, in its opinion herein, professed to follow these principles. The Court went so far as to say that the mere existence of an unsatisfied statutory right was not important, but that it was "the manner of defendants' disregard of these alleged rights which prompts the plaintiff to seek the aid of a Federal court of equity in putting to an end the defendants' alleged conspiracy to cheat and defraud" (R. 304).

From this observation, it appears that the Circuit Court of Appeals read into the plaintiff's bill of complaint allegations which were not there. An examination of the complaint would show that no conspiracy was charged, and that no fraud was properly alleged. A number of acts were charged to have been done fraudulently and wrongfully,* but these epithetical characterizations were mere conclusions, not admitted by the motions to dismiss, and the acts so characterized were nothing more than breaches of alleged statutory duties. Such words, even as qualifying adjectives to more specific charges, are not grounds of equity jurisdiction unless the transactions to which they refer are remediable in equity (*Van Weel* v. *Winston*, 115 U. S. 228, 237); and frequent repetition does not add force (*Ambler* v. *Choteau*, 107 U. S. 586, 591). As this Court said in the case last cited, words like "fraud" and conspiracy" have no more effect than other words of un-

* R. 12: The former city engineer "fraudulently and wrongfully" submitted estimates to the Board of Local Improvements; that Board "fraudulently and wrongfully" voted unanimously to approve the estimates; bonds were "wrongfully and fraudulently" issued to the contractor. R. 14: The Board of Local Improvements, the (then) members thereof, and the (then) city engineer "fraudulently and wrongfully" refuse to file certificate of cost and completion. R. 15: Board of Local Improvements "fraudulently and wrongfully" failed and still fails and refuses to complete the sewer. R. 19: Negotiations in 1931 and up to filing of complaint were "not conducted in good faith" by the former city officials. R. 24, 25: City has "wrongfully and fraudulently" failed to bring action upon surety bond. R. 27: Payment of $358.80 on interest coupons and certain sums out of $1,699.50 collected as principal assessments was "wrongful and fraudulent."

pleasant signification. The Supreme Court of Illinois said in *Doose* v. *Doose,* 300 Ill. 134, 139, that such words are "mere vituperation."

The lower court's references in the opinion (R. 305) to "a fraud on the County Court" and the "abandoned County Court proceeding," are further illustrations of the fact that the court went outside the allegations of the complaint, in order to sustain the claim of Federal equity jurisdiction. Nothing in the complaint avers that the County Court proceedings were abandoned; quite on the contrary, it is expressly alleged that such proceedings were still pending (R. 17). Similarly, it is not even suggested in the complaint that the County Court was defrauded, or in any manner imposed on; the allegations dealing with this subject are that the County Judge in refusing to enforce by contempt process his order directing that the certificate of completion be filed, and in vacating the latter order, was actuated by considerations of political expediency (R. 18, lines 14-31).

The allegation that the former City Attorney suggested that plaintiff file a petition in the County Court, and represented that the City officials would comply with such order as that court might make (R. 17), even when coupled with the allegation that some unspecified negotiations between the plaintiff and the former officials of the City "were not conducted in good faith" (R. 19), utterly fail to sustain the lower court's observation that the City and its former officials had "no intention of being amenable to any adverse decree that the [County] Court might issue" (R. 305).

We, therefore, insist that the only cause of action properly alleged was that which sought to compel the filing by the defendants of the certificate of cost and completion in the County Court. Thus the question becomes: was the Federal equity court competent to exert the desired coercion through the medium of a mandatory injunction?

It is not claimed now or heretofore that the Federal court had power to issue a writ of mandamus in this or in any similar case. The Circuit Court of Appeals seemed to think that the absence of any legal remedy in the Federal courts was a ground for equitable action, but in this the Court erred. The mere absence of a legal remedy in the Federal courts is not, in and of itself, a ground for the exercise of equity jurisdiction by those courts. *Indiana Manufacturing Co.* v. *Koehne*, 188 U. S. 681, 690; *Di Giovanni* v. *Camden Insurance Co.*, 296 U. S. 64, 70; *Atlas Insurance Co.* v. *Southern, Inc.*, 306 U. S. 563, 569, 570. It has been held in the Fifth Circuit that it is improper for a Federal court to issue a mandatory injunction as a substitute for a writ of mandamus (*Fineran* v. *Bailey*, 2 Fed. (2d) 363).

We have, therefore, a case where a claimed right is created by state law, and the question is, shall a Federal court of equity enforce such right although an Illinois equity court would not? A decisive answer is supplied by *Ewing* v. *City of St. Louis*, 5 Wall. 413, 419, where this Court said:

> "The complainant can ask no greater relief in the courts of the United States than he could obtain were he to resort to the state courts. If in the latter courts equity would afford no relief, neither will it in the former."

Cf. *Craig* v. *Leitensdorfer*, 123 U. S. 189, 209.

Parties have no right of access to Federal equity courts unless their matter is one of an equitable nature (*Atlas Ins. Co.* v. *Southern, Inc.*, 306 U. S. 563, 571). There is nothing about plaintiff's substantive right which is of an inherently equitable character. Coercion of public officials to perform their public duty is not one of the recognized heads of equity jurisdiction. *Carlton* v. *Salem*, 103 Mass. 141, 143; *Mann* v. *Mercer County Ct.*, 58 W. Va. 651, 655, 656; 52 S. E. 776, 777; *Franklin Tp.* v. *Crane*, 80 N. J. Eq. 509, 85 Atl. 408; *Bistor* v. *Board of Assessors*, 346 Ill. 362,

369, 373; *Hughes* v. *State Board of Health*, 345 Mo. 995, 137 S. W. (2d) 523.

The state statute under which plaintiff's rights were claimed had nothing to do with the general principles of equity, nor with the Federal equity jurisdiction, and if the state courts in equity were not in a position to grant relief to plaintiff, the same disability attached to the Federal court (*Gorny* v. *Orphans' Board*, a decision of the Seventh Circuit, 93 Fed. (2d) 107, 110, cert. den. 304 U. S. 559; reh. den. 305 U. S. 576; Cf. *Sutton* v. *English*, 246 U. S. 199, 205).

Nor was any case cognizable in a Federal court made by the accounting prayer or the allegations in regard thereto. It appears from the complaint that on this branch of the case, the amount involved was less than $3,000.00 and was in fact not over $1,699.50 (R. 26). This specific allegation obviously controls the general assertion that the amount in controversy exceeded $3,000.00 (R. 3). *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, 86, and see *Clark* v. *Gray*, 306 U. S. 583, 589, 590.

It is respectfully submitted that the writ of certiorari should issue as hereinabove prayed.

Respectfully submitted,

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